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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 521

REBECCA SIMON WOLFSOHN, Executrix for the Estate of Joel David Wolfsohn, Deceased, *Petitioner*

v.

GREGORY HANKIN, *pro se*, and PROFESSIONAL INVESTMENT MANAGEMENT COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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See Petition for Writ of Mandamus 1A-87A:

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Petitioner's Reply to Respondent Hankin's Statement in Opposition in No. 680.

Note: The foregoing rules statutes and authorities involved are to be considered together with those included in petition for mandamus filed contemporaneously herewith.

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Petitioner prays that a writ of certiorari issue to review the order and judgment entered May 6, 1964 (Man. App. 2A) (without an opinion), and final orders entered June 23, 1964, (Man. App. 4-5A) of the United States Court of Appeals denying appellant's motion for summary reversal for judgment and costs in compliance with United States Supreme Court mandate,

granting certiorari, reversing the United States Court of Appeals for the District of Columbia Circuit for dismissing the appeal on the ground of lack of jurisdiction.

OPINIONS OF THE COURT

On April 7, 1964, the order and judgment of this Court issued after petition for rehearing was denied in decision No. 680, October term, 1963, reported in 376 U.S. 203, 1964.

The opinion of the Court of Appeals, No. 17,449, is reported at 321 F. 2d 393 (1963) and set forth in the Appendix at pp. 85A to 87A, with the motion and petition for a writ of mandamus (by reason of jury denial) filed in the alternative contemporaneously with this petition for certiorari.

The District Court judgment is not reported.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), as well as the foregoing judgment of the Supreme Court. It also involves Rule 19(1)(b) Supreme Court Rule, of this Court's obligation to exercise its power of supervision over lower courts that have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

QUESTION PRESENTED

Can an orderly system of jurisprudence and litigation endure, where the Court of Appeals refuses to comply with the clear mandate and judgment of the Supreme Court of the United States, without an opinion or reason therefore (after its judgment on

an untimely appeal had been reversed and certiorari granted), denies apt jury demands on both the original complaint and respondents' counterclaim, refuses to vacate summary judgment entered upon an inappropriate record, and is certiorari or mandamus the proper remedy?

CONSTITUTION AND STATUTES INVOLVED

Constitution of the United States—Seventh Amendment:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Rule 38(a) of the Federal Rules of Civil Procedure:

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Rule 8 of the Federal Rules of Civil Procedure.

Rule 11 of the Federal Rules of Civil Procedure.

Rule 12 of the Federal Rules of Civil Procedure.

Rule 23 of the Federal Rules of Civil Procedure.

Rule 56 of the Federal Rules of Civil Procedure. SUMMARY JUDGEMENT.

Rule 19(1)(b) of the Supreme Court of the United States.

Local Rule 9(h)—U. S. District Court for District of Columbia

The foregoing rules and statutes involved are to be considered together with those included in petition for mandamus filed contemporaneously herewith.

STATEMENT OF THE CASE

On December 17, 1963, petitioner, widow of Joel David Wolfsohn, a distinguished member of the District of Columbia and Illinois Bars and public servant, filed her petition for a Writ of Certiorari, seeking review of her appeal previously dismissed by the Court of Appeals for the District of Columbia on the question of timeliness, on May 29, 1963 (Man. App. 85A), involving the United States District Court *order denied* on *October 12, 1962*, which recited, "(1) *the plaintiff's motion for summary judgment and denying the plaintiff's motions for judgment on the pleadings and for summary judgment* (2) *the plaintiff's demand for jury trial and* (3) *the defendants' opposition thereto.*" (JA 52) This Court granted Certiorari and ordered the judgment reversed with costs on February 24, 1964, in No. 680 (Man. App. 1A). In exact conformity with the ruling of this Court, petitioner filed appellan's motion for summary reversal and judgment and for costs in compliance with the mandate of this Court (Man. App. 4A (R 304)). On June 23, 1964, motions for rehearing and to vacate said order of May 6, 1964, and for reconsideration were denied by the Court and by the Court en banc, with Chief Judge Bazelon and Circuit Judges Fahy and Washington not participating (Man. App. 5A). No reason or explanation was given.

Record Associated With Petition for Writ of Mandamus

Petitioner is associating the record supporting the alternative contemporary petition for mandamus with the within petition for certiorari to avoid unnecessary duplication and to curtail the hardship of expense. There is only one mutual appendix attached to petition for mandamus. Petitioner requests that applicable portions of the record be considered a part hereof by reference thereto.

REASONS FOR GRANTING CERTIORARI

A vital issue of jurisprudence is here involved. Petitioner was denied due process of law in flagrant violation of orderly administration of justice by the courts, contemplated under the Federal Rules of Civil Procedure and in clear derogation of her rights under the Seventh Amendment to the Constitution, the very foundation of our jury system, by denial of her apt jury demand. To that extent it fits that category of cases described by one justice of this Court as a "controversy of importance with respect to legal principles," and by another, a case "of general importance." This Court granted certiorari and reversed an alleged untimely appeal. Thereafter, petitioner made a motion in the Court of Appeals for summary reversal and costs in compliance with the mandate of the United States Supreme Court (R 304-7). The Court of Appeals capriciously denied without a hearing or an opinion to explain its failure to comply with the order and judgment of this Court, or as to what prompted the unprecedented action (R 302-3).

The Supreme Court of the United States is the highest tribunal of the land. It is unthinkable and devastating to permit the precedent and far-reaching consequences of an inferior court to cavalierly brush aside and make a mockery of the solemn and grave deliberations of the Supreme Court of the United States, without substantial cogent grounds of the highest character in support thereof. To permit such a momentous impropriety unchallenged would inevitably weaken the public respect and disrupt the prestige of the Supreme Court. It will cause chaos by destroying confidence in the "Great faith in the perception of the reviewing court that justice will be done and is the American way of life."

The reasons supporting the issuance of a writ of mandamus are also peculiarly appropriate and are adopted with this petition for certiorari. They are:—

(1) **The refusal of the Court of Appeals to comply with the mandate of the Supreme Court is a denial of due process** (Man. petn. pp. 16-21),

(2) **The maxim "Falsus in Uno Falsus in omnibus"** (Man. pet. pp. 21-26),

(3) **"There was no basis for denial of trial by jury and entry of summary judgment for defendants on complex facts peculiarly within their knowledge, involving the credibility of witnesses on controverted material facts in pleadings** (Man. petn. p. 26 to conclusion).

The jury demand upon the original complaint (Man. App. pp. 18A-40-4) and the jury demand opposing the HANKIN/PIMCO counterclaim (Man. App. 71-3A) were pending when petitioner filed her motion for compliance with the Supreme Court mandate (Man. App. 2A), and at the same time only petitioner's brief (R 330-57) and Reply brief (Man. App. 6A) remained for consideration after Frederick A. Ballard, Esq. attorney for appellee Hankin was granted leave to delete and amend irregularly inserted and scurrilous material (Man. App. 59A).

The rejection of the Court of Appeals of its reversal by the Supreme Court without any supporting opinion or reason flies in the face of all tradition. Moreover, the analysis of the record by petitioner shows not only is it devoid of support, but it faces a mountain of contravention. Mr. Justice Goldberg in *Foman* v. *Davis*, 371 U.S. 178, specifically reversed the Court of Appeals because of narrow reading of the facts and its inconsistencies with the spirit of the Federal

rules" (182). Mr. Justice Brandeis in *Fairmont Glass Works* v. *Coal Co.*, 287 U.S. 474 (at page 485) stated "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity." Therefore, under our American system of justice, common sense and law should go hand in hand. Here motions for summary judgment in favor of defendants were granted not only upon controverted facts in the pleadings in the U.S. District Court, but admissions of a corrupt merger (Man. App. 61A) were made in the Court of Appeals itself, together with the fact that a corrupt record (Man. Petn. p. 8 and 7A) also is involved. When respondent Hankin admitted two sets of books and concealment of material records (Man. App. 12a) he automatically admitted fraudulent concealment that entitled petitioner at least the $10,000 under Mr. Wolfsohn's written demand, (Man. App. p. 45A) and under the special circumstances, proportionate damages under Rule 23 F.R.C.P. Respondent Hankin made another serious admission of fraud of monstrous import. The PIMCO stock formerly valued at $10.00 per share had been depressed to 30¢ and yet his $5,000 yearly salary contract (Man. App. 29A) had been blown up to $50,000 (Man. App. 12A). If there was no surplus why were Hankin, his son and nephew allowed to receive $83,333 (Man. App. p. 36A, 61A) in cash under summary judgment in the merger, and petitioner and other stockholders defrauded out of their rights and paid off with deficits? The motion and affidavit by PIMCO (Man. App. p. 61A) in the Court of Appeals, just before its May 29, 1963 judgment was reversed by this Court (Man. App. p. 85A) discloses there was no consideration to dismiss the defendant Consumers Investment Fund (CIF)

except an understanding to dismiss all litigation, which Hankin thwarted because he profited by everything in excess of $1,000, and to that extent only he admits his statement "The real and only respondent herein is Gregory Hankin" (see Mandamus brief p. 22 "Falsus in uno falsus in omnibus"). Mr. Hankin's disregard for ethics and everything the Federal Rules of Procedure exemplify makes the startling disclosure on May 13, 1964, (in opposing compliance with the Supreme Court Mandate) that William J. Erickson is now President of Consumers Investment Fund (Man. App. 54A (R 321)). Mr. Erickson is the head of the law firm writing letters to Chief Justice Warren in the Supreme Court (Man. App. 50A) and Chief Judge Bazelon of the Court of Appeals (Man. App. 56A). The 2nd Circuit in *Robins* v. *Ryan*, C.A. N.Y. 1962, 310 F.2d 797, has held that a writ of mandamus is a proper means of protecting right to jury trial; that as long as the substance of what is pleaded is a claim for law a jury demand will not be defeated. This is consistent with petitioner's argument in the petition for a writ of mandamus filed in the alternative. In *Baxter* v. *Lancer Industries, Inc.*, D.C. N.Y. 1963, 213 F. Supp. 92, the E. D. held the question of intention may not properly be resolved by a motion for summary judgment where surplus was also involved:

> "In action to enforce a written agreement between plaintiff and corporate defendant whereby defendant agreed to repurchase certain stock, plaintiff was not entitled to summary judgment in view of substantial questions of fact as to intention of parties, and as to whether corporation had a surplus which, under law of Florida which was the state of defendant's incorporation, was necessary in order to repurchase its own stock."

In the within proceeding Hankin was the dominant head of the merger and a director and officer in both the buying and selling corporations (Man. App. 36A, 61A) which should have precluded summary judgment. An applicable situation appears in *Buren* v. *Schein*, D.C. N.Y. 1963, 32 F.R.D. (1963) p. 218, where the court held:

> "Pleadings, depositions and conflicting affidavits presented genuine issue of material fact as to whether defendant, a corporate officer, director and stockholder, had knowledge of pending negotiations for sale of all of stock of corporation to new purchaser and had made false representations to induce plaintiff to sell her stock to defendant, precluding summary judgment."

The Supervisory Authority of this Court (Rule 19(1)(b))

This Court's Rule 19(1)(b) provides in part that "where a Court of Appeals * * * has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision, a review of the said decision is necessary on writs of certiorari by this Court. Precisely the above type of action has taken place. The conduct of the Court of Appeals is not justifiable under the rule of law or the rules of logic, in the application of its own rules and orders. Unsworn papers of other proceedings and conferences were irregularly introduced in the record in violation of the requirements of Rule 56(e) as to personal knowledge and the admissibility of evidence. *American Securit Co.* v. *Hamilton Glass Co., Inc.*, 254 F.(2d) 889 (CA 7th, 1958). The Hankin admission of two sets of books (Man. App. 12A) resulted in this litigation by con-

cealment of special minutes of February 11, 1959, (JA 37-R 355-7) justified an immediate reversal and entry of judgment for $10,000 in favor of petitioner plus damages under Rule 23 or triple damages. These special minutes went to the very root of the question as to whether decedent had voluntarily resigned to Hankin on March 9, 1959 or continued in force his involuntary demand (Man. App. p. 27A-31A) In *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F.(2d) 885, the Court said: "It seems rather more reasonable to infer that the fact was omitted from the declaration to avoid the application of the statute of limitations." *Lemley* v. *Christophersen*, 150 F.2d 291. Here the omission was wilful to conceal an irregular corporate merger in which Hankin made admissions of receiving at least $72,000 which was later disclosed as an understatement (Man. App. p. 61A). *Pitcairn* v. *Phillip Hess Co.*, 113 Fed. 492; *Reading Steel Casting Co.* v. *U.S.*, 268 U.S. 186, 69 L. Ed. 907, 45 Sup. Ct. 469. And finally, without any explanation whatsoever, the lower court failed to honor the mandate of the Supreme Court (Man. App. p. 2A).

CONCLUSION

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings by sanctioning irregularities by respondents under Federal Rules of Civil Procedure, denied due process and jury trials guaranteed under the Seventh Amendment to the Constitution, declared forfeiture of rights under Petitioner's complaint (Man. App. p. 18-22A) despite admissions in respondents' pleadings and briefs that required judgment in petitioner's favor forthwith, and itself has acted capriciously and arbitrarily in negating the mandate of the Supreme Court of the United States

as to require this Court's intervention. Such conduct by the lower court is abuse of discretion and will cause chaos through encouraging lack of confidence in the Supreme Court's orders and judgments. For the foregoing important reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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